

**IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

ENCORE RECEIVABLE MANAGEMENT, INC.,
CONVERGYS CUSTOMER MANAGEMENT
GROUP INC.,

Plaintiffs,

V.

ACE PROPERTY AND CASUALTY INSURANCE COMPANY, AMERICAN GUARANTEE INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, CONTINENTAL CASUALTY INSURANCE COMPANY, DISCOVER PROPERTY AND CASUALTY INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Defendants.

No.: 1:12-cv-00297

Judge Timothy S. Black

**PLAINTIFFS' RESPONSE TO DEFENDANT ACE PROPERTY
AND CASUALTY INSURANCE COMPANY'S PROPOSED FINDINGS OF FACT**

Pursuant to Section A.2-4 of the Standing Order Governing Civil Motions for Summary Judgment, Plaintiffs Encore Receivable Management and Convergys Customer Management Group Inc. hereby submit the following Response to Defendant Ace Property and Casualty Insurance Company's ("ACE") Proposed Findings Of Fact And Conclusions Of Law In Opposition To Plaintiffs' Motion For Partial Summary Judgment (Dkt. No. 114), including the Disputed Issues of Material Fact.

Because Section A.2-4 of the Standing Order Governing Civil Motions for Summary Judgment does not provide for conclusions of law, Plaintiffs have not responded to ACE's

Proposed Conclusions Of Law. In any event, out of an abundance of caution, Plaintiffs deny all of ACE's Proposed Conclusions Of Law.

1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.¹

17. Admitted.

18. Denied. (*See* Exhibit 1 to Affidavit of Jane Beimesche, dated May 22, 2013

("Beimesche Aff.").)

19. Admitted.

¹ Plaintiffs note that the endorsement number for the Professional Services Liability Exclusion varies from policy to policy.

20. Denied. (*See* First Amended *Wheelock* Complaint, Dkt. No. 113-3, at ¶¶ 1-3, 6-8, 23, 32, 33, 36-40; Beimesche Aff., Ex. 1.)

21. Admitted.

22. Admitted.

23. Admitted, but Plaintiffs clarify that the references in the *Wheelock* Action are addressed to “Defendants.” (Dkt. No. 46-3 at 11.)

24. Admitted.

25. Admitted.

26. Admitted.

27. Admitted.

28. Admitted.

29. Denied. (*See* Beimesche Aff., Ex. 2.)

30. Denied. (*See* Beimesche Aff., Ex. 2.)

31. Admitted.

32. Admitted.

33. Admitted.

34. Admitted.

35. Admitted.

36. Admitted.

37. Admitted.

38. Admitted.

Disputed Issues of Material Fact

1. Convergys, through its broker, Hayes Companies, provided ACE with notice of the *Knell* Action under the ACE Policies on February 28, 2012. (Beimesche Aff., Ex. 2.)

2. CMG is one of 10 DOE defendants named in the *Wheelock* Action. (See First Amended *Wheelock* Complaint at ¶¶ 1-3, 6-8, 23, 32, 33, 36-40, Dkt. No. 113-3; Beimesche Aff., Ex. 1.)

3. The recordings at issue in the *Wheelock* Action were disclosed to people not a party to those recorded conversations. (See Affidavit of Chad Hunsaker, Dkt. No. 67 (“Hunsaker Aff.”), at ¶¶ 7-9.)

4. The recordings at issue in the *Wheelock* Action did not constitute a “criminal act” because the call center where the recordings took place was located in Utah where the undisclosed recording of telephone calls does not constitute a criminal act. (See Hunsaker Aff., at ¶ 2.)

Dated: May 24, 2013

Respectfully submitted,

/s/ Adam Ziffer

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Adam Ziffer (admitted *pro hac vice*)

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Attorneys for Plaintiffs Encore Receivable

*Management, Inc. and Convergys Customer
Management Group Inc.*

CERTIFICATE OF SERVICE

I hereby certify that, on May 24, 2013, the foregoing was served on the parties by filing it with the Court's CM/ECF system, which will send electronic notices to the parties' counsel of record.

/s/ Adam Ziffer
Adam Ziffer